No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF *AMICUS CURIAE* OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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INTEREST OF *AMICUS CURIAE*

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (the "Chicago Lawyers' Committee") was founded in 1969 as a cooperative effort of Chicago's leading law firms to provide *pro bono* legal assistance to the poor and minorities seeking equal access to employment, public accommodations, housing, and education. Today the Chicago Lawyers' Committee is involved in a broad range of civil rights issues, including employment discrimination, fair and affordable housing, immigrants' rights, education, penal reform, administration of justice, voting rights, and equal access.

In 1989, the Chicago Lawyers' Committee established the Project to Combat Bias Violence in response to the increasing incidence of bias violence. The Project to Combat Bias Violence provides volunteer lawyers to engage in victim advocacy in criminal prosecutions and to bring civil actions on behalf of victims.

Juries in both state and federal courts in Illinois have returned substantial verdicts in favor of victims in civil actions brought under the Illinois bias violence statute by volunteer lawyers for the Project to Combat Bias Violence, and additional civil actions are pending and planned. The Chicago Lawyers' Committee has a substantial interest in establishing the constitutionality of the bias violence statute struck down by the Wisconsin Supreme Court, particularly because of its similarity to the bias violence statute in Illinois.

ARGUMENT

The Wisconsin Supreme Court struck down Wisconsin's bias violence statute on the ground that it violated the First Amendment. *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). But the First Amendment is not even implicated in, much less violated by, Wisconsin's bias violence statute.

The Wisconsin statute authorizes the imposition of increased maximum penalties if the person committing the crime "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual-orientation, national origin or ancestry of that person . . . ." Wis. Stat. § 939.645(1)(b) (1989-90). Discriminatory selection of the victim—selection based on the victim's status—is the essential element of the statute. Expression—whether speech or expressive conduct—is simply not an element at all.

The decision of the Wisconsin Supreme Court is directly contrary to this Court's decision last term in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). In *R.A.V.*, this Court clearly stated: "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. The St. Paul, Minnesota ordinance at issue in *R.A.V.* was, by its terms, directed at the content of expression. Indeed, it regulated expression based on the viewpoint contained in the message. In contrast, the Wisconsin statute is directed at conduct without regard to expression. The Wisconsin statute does not in any way restrict the ability of a person to believe anything, to hate anyone, or to express any point of view; it simply

punishes the act of committing a crime against someone because of that person's status. As Justice Abrahamson aptly stated in her dissent in *Mitchell*: "[T]he statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct." 469 Wis. 2d at 181, 485 N.W.2d at 819.

The decision of the Wisconsin Supreme Court is also inconsistent with this Court's decision last term in *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). In *Dawson*, this Court held that the Constitution does not preclude the admission of relevant evidence "concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 1097. *See also Barclay v. Florida*, 463 U.S. 939 (1983) (upholding admission of evidence of racial animus in capital sentencing proceeding). There is no logical or legal basis for allowing a judge or jury to consider discriminatory victim selection in determining the imposition of criminal penalties while forbidding a legislature from doing so.

Moreover, the Wisconsin Supreme Court's decision cannot be reconciled with this Court's analysis of the constitutionality of antidiscrimination laws in *R.A.V.* Citing a series of federal antidiscrimination laws, this Court noted that "words can in some circumstances violate laws directed not against speech but against conduct . . . ." 112 S. Ct. at 2546. This Court held, however, that so long as conduct is not singled out "on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. Yet, that is precisely what the Wisconsin Supreme Court has done.

There is no principled distinction between the Wisconsin bias violence statute and the federal antidiscrimination laws cited with approval by this Court in *R.A.V.* The essential element in both is discriminatory selection of the victim—selection based on the victim's status. Indeed, the operative language in the Wisconsin bias violence statute is the same as or substantially similar to the operative language in many federal antidiscrimination laws. *Compare* Wis. Stat. § 939.645(1)(b) (1989-90) ("because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person") *with* 42 U.S.C. § 2000e-2(a)(1) (1988) ("because of such individual's race, color, religion, sex, or national origin").

As Justice Bablitch tellingly questioned in his dissent in *Mitchell*: "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity?" 469 Wis. 2d at 183, 485 N.W.2d at 820. The answer is: it cannot. The decision of the Wisconsin Supreme Court is based on a seriously erroneous reading of the limits imposed by the First Amendment, and it is plainly inconsistent with this Court's recent decisions in *R.A.V.* and *Dawson*.

CONCLUSION

Nothing threatens to unravel the fabric of our heterogeneous society more than violence directed at persons because of characteristics such as their race or religion. Yet, under the mistaken belief that the First Amendment prevents the states from providing a remedy for bias violence, the Wisconsin Supreme Court struck down a statute that provides such a remedy. This Court should reverse the decision of the Wisconsin Supreme Court and make clear that the First Amendment does not bar the states from providing a remedy for bias violence.

Respectfully submitted,

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